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# The conflict between direct democracy and international law: analysing the Swiss case

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## <Abstract>

The rising number of Swiss popular initiatives conflicting with international law reflects the decline of Swiss consensus democracy. A case in point is the 2009 ban on the construction of minarets, which focused international attention on Switzerland and its direct democracy. The Constitution can be amended through popular initiatives that - following the collection of 100,000 signatures and a popular vote - put demand on the executive and the legislature to transcribe the constitutional popular initiative into a law. Therefore, the Swiss Constitution might violate international law. This conflict arose due to the absence of judicial review, such as a constitutional court, and the absence of limits to popular initiatives. Even though in 1999 *jus cogens*, or mandatory international law, was established as a criterion to invalidate popular initiatives, this provision has so far never been applied. The article outlines how increased polarization in the Swiss political system has turned the popular initiative into a potentially destabilizing political instrument and analyses efforts to solve the elusive issue of conflicts between popular sovereignty and international law.


**Key words:** consociational democracy, direct democracy, international law, judicial review, popular referendum, Switzerland

# I. Introduction

In November 2009, Switzerland made headlines in the world media due to its long tradition of direct democracy, yet this time not in any positive manner. To the surprise of the Swiss official authorities, of many Swiss people, and the disapproval of much of the rest of the world, the Swiss electorate approved

the introduction of a ban on the construction of minarets (an architectural feature of Islamic mosques). This was possible because the Swiss system of direct democracy allows 100,000 Swiss citizens to put forward a 'popular initiative' for the 'partial revision' of the Swiss Federal Constitution.[1)]

In this particular case, an initiative of politicians deriving from two right-wing parties - one minor and one major - demanded to outlaw the construction of minarets in Switzerland, and this suggestion was approved by a majority of 57.5 percent of the electorate on a turnout of 53.8 percent (Federal Chancellery, 2009). Following this vote, two complaints were submitted to the European Court of Human Rights by a former spokesman of the Geneva mosque and by four Swiss Muslim associations, respectively. However, both complaints were dismissed as non-admissible since the plaintiffs had not actually attempted to build a minaret. Subsequently, no actual case had been contested through the Swiss judicial system and the Court therefore declared that the plaintiffs 'could not claim to be the "victims" of a violation of the Convention' (ECtHR, 2011).

On this occasion, Swiss authorities escaped censure by the Strasbourg judges; yet many strands of international public opinion were critical of Switzerland for arguably violating fundamental human rights concerning religious freedom. The Swiss minaret ban initiative highlighted to a global audience the potential conflict between Switzerland's system of direct democracy and international law. Thus, the controversy was triggered by the country's system of direct democracy, namely the right of the Swiss people to put forward popular initiatives that allow amending the country's Constitution.[2)]

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1) The federal Swiss state is based on 26 cantons with 26 separate constitutional documents. This paper focuses exclusively on the federal Swiss state and the federal Constitution.

2) It needs to be stressed that the Swiss Federal Constitution contains detailed policy provisions that would belong to the scope of ordinary legislation in most other countries. The Swiss

In other words, this difficult situation emerged due to the lack of institutional mechanisms to regulate contradictions between domestic and international law within the Swiss political and judicial system. All articles of the Swiss Constitution can be amended by the people without consideration of a legal hierarchy between different constitutional provisions (Distefano and Mahon, 2011). Moreover, such popular initiatives are not checked by judicial review of, for example, a Constitutional Court.

The Swiss federal government, termed the Federal Council of Switzerland, is the country's collegial government body. It consists of seven members, referred to as federal councillors, that are drawn from five of Switzerland's major political parties.[3] Thus, the Federal Council represents the consensus-oriented Swiss model of democracy based on power-sharing. At the same time, the Swiss federal parliament, termed the Federal Assembly, consists of the National Council or lower house representing the Swiss people and the Council of States or upper house representing the 26 Swiss cantons.

In addition to the classical power-sharing structure of the three branches, i.e. executive, legislative and judiciary, Swiss democracy also grants the people a direct say in politics through two instruments, namely popular referendums - briefly explained in the next section - and popular initiatives. Thus, the government and the parliaments are expected to write laws reflecting popular initiatives that have been endorsed by the Swiss people.

The following article explores the tensions between Switzerland's direct democracy, namely the popular initiative, and international law. It will highlight

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people themselves, through the popular initiative, have the power to submit demands for any changes of their Constitution.

3) The five parties represented in the Swiss Federal Council are at present in order of electoral support the Swiss People's Party (SVP); Social Democratic Party (SP); Free Democratic Party (FDP); Christian Democratic People's Party (CVP); and Bourgeois Democratic Party (BDP). The political science literature refers to the Swiss case of collegial government of the major parties as one of the examples of consociational democracy (Lijphart 1999).

that the 'Minaret case' was not the first time that political authorities faced problematic popular initiatives. On earlier occasions, such as in the case of the popular initiative 'For a reasonable asylum policy', advanced by a far-right party in 1992, the Federal Council developed an argumentation based on the *jus cogens* (mandatory provisions of international law) and persuaded the Federal Assembly to invalidate this particular popular initiative in 1996, which therefore was not voted on by the people (Swiss Confederation, 1994).[4] However, the notion that a mandatory provision of international law limits the scope of the right of popular initiatives was only added in 1999 during a full-scale revision of the Swiss Constitution.[5]

Since the Swiss Constitution does not contain any rules regulating contradictory provisions between articles of the Constitution and international law, conflict can lead to deadlock. Thus, in the case of popular initiatives that are in breach of international law, the parliament would need to enact a domestic bill violating international law – taking the risk of being condemned by an international court – or it could try interpreting the popular initiative in a way that avoids violating international law, and in doing so would not respect the popular will. To put an end to this dilemma, some observers proposed to denounce the related article of international treaties. However, most of the time it is not possible to abandon specific articles, and even if *stricto sensu*

4) The decision of parliament to declare a popular initiative invalid after the successful collection of 100,000 signatures is rarely used in the Swiss context and only four initiatives (in 1955, 1977, 1995, and 1996) were declared invalid. In the case of the initiative "For a reasonable asylum policy", it was argued that '[t]he Federal Council shares the conviction of the community of states and the new teaching that such norms in a state based on legality [*Rechtsstaat*] constitute material barriers against the revision of the constitution. For this reason, the initiative 'For a reasonable asylum policy' must be declared invalid' (Swiss Confederation, 1994: 1488).

5) Since 1874, the Swiss Federal Constitution has been partially revised many times which made the document less coherent. In order to address this issue, a fully revised Constitution was approved by the Swiss electorate in 1999.

the treaty in question might not belong to mandatory international law, it is still not possible to denounce it for political, economic, or moral reasons.

Thus, Swiss popular initiatives that contradict international law potentially have a negative impact on international relations and raise the question of limits on people's popular sovereignty.

# II. Stating the problem

## 1. Special features of the Swiss polity

At the Swiss federal level, there exists no judicial review maintaining the continuity of the Swiss Federal Constitution. Consequently, the Swiss Federal Supreme Court is only allowed to review lower cantonal laws and cantonal constitutions, which derive from the 26 cantons that jointly constitute the Swiss federal state. Moreover, the constitutional Article 190, introduced in the 1874 full-scale revision of the Constitution obliges 'the Federal Supreme Court and other bodies to apply federal laws, even if they are considered to be unconstitutional' (Rothmayr, 2001: 78 - 79).

In 1874 and 1891, Switzerland introduced the two main tools of its direct democracy, namely the popular referendum and the popular initiative, respectively.[6] First, the *referendum* (mandatory or facultative) grants the Swiss people the power to approve or reject legislative texts such as constitutional provisions, national laws, or international treaties. The referendum is reactive and takes place after previous government action or parliamentary legislation. It grants the Swiss people the right to confirm or

6) The Swiss political system is referred to as semi-direct democracy since direct and representative mechanisms of democracy co-exist.

reject the actions of their representatives. Second, the initiative is directly advanced by sections of the Swiss people and consists of a proposition to amend the Constitution. Thus, the initiative allows direct intervention into the political process by a section of the population.

<Table 1> Types of direct democracy in the Swiss polity

| Level of Legislation | Popular Referendum<br>reactive expression of popular will towards parliamentary legislation | Popular Initiative<br>direct expression of popular will | Required Voting Majorities |
|---|---|---|---|
| Federal Constitution | mandatory | (100,000 signatures must be collected within 18 months) | double majority (people and cantons) |
| Federal Law | facultative (50,000 signatures within 100 days)[7] | NA | simple majority (people) |

As outlined in table 1, Switzerland uses three types of referendum and initiative: (1) the mandatory referendum concerns amendments of the Constitution or issues such as the country's joining of international institutions and requires a double majority of the people and the cantons to be approved; (2) the facultative referendum takes place if it is requested by at least 50,000

7) Similarly, eight cantons can request a facultative referendum.

citizens and can then be approved with an ordinary popular majority; and (3) popular initiatives for the amendment of the Swiss Constitution that are the focus of this article. The fourth conceivable option (compare NA in table 1), namely popular initiatives to allow Swiss people to amend federal laws directly, was introduced in 2003; yet the related constitutional article was abrogated again six years later for lack of use and due to controversy over its implementation (Hottelier, 2003: 662; Marquis, 2009).

## 2. The case of the popular initiative

Turning now to our case study of the popular initiative, it allows amendments of the Swiss Constitution (termed 'partial revision') that are deriving directly from the popular will. Thus, the Swiss electorate has the power to amend, almost without limitations, the Federal Constitution, that is the basic law which regulates all other domestic laws. It can even introduce internally contradictory articles into the Constitution. Furthermore, it has been pointed out that no hierarchy exists between the constitutional provisions and 'a popular initiative may violate a constitutional provision already in force: yet both standards are indeed at the same normative level' (Marquis, 2009: 3).[8)]

The process of a popular initiative is as follows. First, initiators create a committee, which submits the popular initiative to the federal administration. Since 1978, a formal preliminary examination by the Federal Chancellery takes place. However, this review is restricted to procedures and formal requirements and the actual political content of the initiative is not reviewed (Swiss Confederation, 2011). If approved, the initiators of a popular initiative have 18 months to collect at least 100,000 Swiss citizens' signatures. If successful at this stage, the popular initiative is logged in the Federal Chancellery and

8) All English-language translations of French and German sources are by the authors.

has to be validated before it is put to a vote by the Swiss people.

For this purpose, the Federal Council first analyzes the popular initiative regarding its validity, and then transmits a decree to the parliament accompanied with a message (Federal Assembly, 2012: Article 97, 98). Second, the Federal Assembly, which holds the formal authority to validate an initiative, decides according to the constitutional provisions of Article 139, Section 3: 'If the initiative fails to comply with the requirements of consistency of form, and of subject matter, or if it infringes mandatory provisions of international law, the Federal Assembly shall declare it to be invalid in whole or in part' (Federal Constitution of the Swiss Confederation, 1999). This signifies the following:

1. The principle of uniformity indicates that initiatives must be submitted either as general proposal[9] or drafted in specific terms. In other words, an initiative cannot combine both forms.
2. As for the subject matter, the different parts of the initiative must be linked by connections between issues, ensuring a degree of unity of objective.
3. Finally, mandatory rules of international law are also excluded from the scope of the partial revision of the Constitution. If such popular initiative were to be put forward, they would have to be invalidated by the Federal Parliament.

If any of these three principles is violated, the popular initiative must be declared invalid (Kaufmann *et al.,* 2005: 172). If the Federal Assembly opposes the initiative in question, it has the right to submit a direct counter proposal, which will be presented at the same time as the popular initiative to the people's vote. Since a 1987 procedural reform, Swiss people can cast

9) A popular initiative submitted as a general proposal and approved in a popular vote will be taken up by the Federal Council and a constitutional amendment will be drafted and submitted to the Federal Assembly for enactment.

a ‘double yes’, i.e. they can vote yes to the popular initiative and yes to its parliamentary counterproposal. In such cases, a third subsidiary question is also provided to designate which text should be retained if both proposals should be approved. In case of approval, the new or amended constitutional article needs generally to be implemented through a federal law (Hottelier, 2003). To that end the Federal Council elaborates a bill, which is forwarded to the National Council and the Council of States, where it can be accepted, amended, or rejected. Once upper and lower chambers have agreed on a common text, the bill becomes a law, which brings the popular initiative to a close.

Swiss citizens are invited, four times a year, to exercise their popular rights by casting a ballot paper on various topics brought upon by popular initiatives and/or referendums. Since the 1970s, the number of voting issues has grown, while people’s participation has dropped and now usually remains below 50 per cent on average. Higher numbers of initiatives potentially also increase the number of problematic ones, such as in the case of clashes with international law.

In this context, the 1999 full-scale revision of the Federal Constitution introduced a new condition for the validity of popular initiatives based on imperative international law (Article 139). However, the Federal Council has subsequently followed a narrow interpretation of this criterion and has never suggested invalidating popular initiatives on account of conflicts with imperative international law, and the Federal Assembly has continuously decided in line with these recommendations (Marquis, 2009: 7).

## 3. Primacy of international law over national law

Two traditions exist in the relationship between national and international law, namely the monistic and the dualist tradition. The monistic tradition, as

present in the case of Switzerland, is based on the assumption of a single legal order in which international law is part of the domestic legal system. Thus, international law is automatically incorporated, takes immediate effect, and no new implementing law is required. In the hierarchy of monistic systems, international law is therefore generally granted a higher normative status in comparison to domestic law.

On the other hand, the dualist tradition, as present in the case of Germany, holds that international law coexists with national law and does not enjoy primacy. It therefore requires a domestic law to make the international law applicable. Once the international law has been transformed and incorporated into domestic law, it has the same status than other domestic laws.

According to the Federal Council, Switzerland belongs to the monistic tradition (Swiss Confederation, 2010: 2264). This tradition is characterized by the acceptance of international law which recognizes internally the immediate validity of international law and its direct applicability as long as it is 'accurate enough to serve as the base for a decision in a concrete case' (*ibid.*). In principle, international law takes precedent over Swiss law (*ibid.*) and Article 5, Section 4 of the Swiss Constitution holds that the Confederation and the Cantons – in other words, all state organs – must respect international law and apply it internally.

The Federal Council states that the relationship between international law and Swiss national law depends on three elements, namely (1) validity, (2) applicability, and (3) hierarchy of norms. As for validity, this concerns the issue of whether or not an international law immediately acquires the force of law within the State. As for applicability, this concerns the question of whether or not the court can directly apply international law or requires clarification on its applicability through a domestic law.

As for the problem of hierarchy, this concerns the issue of conflicting

national and international legal norms and which of them shall prevail (*ibid.*: 2284). Crucially, the Federal Constitution contains no explicit provisions offering guidance in case of conflict between national laws and/or the Constitution, on the one hand, and international law on the other hand. If constitutional provisions contradict international conventions, there is no rule requiring that international law takes precedence in all cases or, conversely, that the constitutional provision takes precedence in all cases (*ibid.*: 2308).

## 4. Jus cogens v. jus dispositivum

The concept of *jus cogens* can be traced back to the Roman law, which relates to the *jus strictum* or mandatory law, as opposed to *jus dispositivum*, which only results from the will of the parties. *Jus cogens* was formally codified in 1969 through the Vienna Convention on the Law of Treaties and is defined in its Articles 53 and 64. The term *jus cogens* refers to a preeminent norm of general international law, which is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted' (United Nations, 2005: 18). It is therefore a provision so fundamental to the ratifying states in the international system that no violation could be accepted. Moreover, Article 53 specifies that a treaty is void if, at the time of its agreement, it conflicts with the *jus cogens*.

There exists no official exhaustive list of *jus cogens*, which demonstrates its dynamic nature (Burri *et al.,* 2011: 24). However, the International Law Commission (ILC) and the International Court of Justice (ICJ) have described some examples: prohibition of the use of force, genocide, slavery, torture, and racial discrimination. The Federal Council includes the mandatory provisions of the European Convention on Human Rights (ECHR)[10] in the *jus cogens*,

10) The European Convention on Human Rights is abbreviated in the literature as ECHR, while the abbreviation used to refer to the European Court of Human Rights is ECtHR.

but considers the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) and the UN International Covenant on Civil and Political Rights (ICCPR) only as non-breakable, but not as part of the *jus cogens*. Customary law and general principles of law are equally non-breakable (Swiss Confederation, 2011: 2314).[11)]

Legal doctrine scholars recently started to designate these UN treaties along with more technical or economic ones, like bilateral agreements with the EU and WTO agreements, as *de facto* mandatory international law, distinguishing them from the conventional international law (Federal Chancellery, 2012: 65). Following a strict interpretation of the *jus cogens*, they do not belong to that higher priority type but they are nevertheless formally not breakable: '*De facto* mandatory international law exists whenever the international responsibility of offences against international law or the termination of state treaties would trigger such far-reaching results for Switzerland that the intentions of the popular initiative would be comparatively of little relevance' (Schefer and Zimmermann, 2011: 354).

Since the 1990s, 'more and more popular initiatives are not clashing with international mandatory laws (*jus cogens*) but with other international law that cannot always be terminated or in which termination is difficult to conceive for political reasons' (Swiss Confederation, 2011: 3632). It has been pointed out that out of '18 adopted popular initiatives since 1893, alone six were accepted in the last nine years, and four of these must be considered as problematic regarding the rule of law' (Burri *et al.,* 2011: 58). It is often difficult to predict the people's vote because the Swiss people, as the sovereign, are not accountable to any higher authority and are entitled to take contradictory decisions at different points in time.

Thus, the Federal Council stated that 'in the case of popular initiatives that

11) Although customary law is less codified in the international context, it carries the same weight as other types of law.

contradict only non-mandatory international law, the initiative must be declared valid and voted on by the people and the cantons' (Swiss Confederation, 2010: 2316). Instead of solving the conflict at the level of the review of the validity of the popular initiative, i.e. prior to the vote casting, conflicts are therefore shifted to the Federal Council and ultimately to the legislature and the implementation stage. The same report states further that '[i]f implementation complying with international law is not possible, the Ultima Ratio of termination of an international treaty has to be considered' (Swiss Confederation, 2010: 2317).

It has been asserted that the Swiss people 'fall hostage to political groups for which the right of initiative is no longer an entitlement to submit a society project [*projet de société*], but only serves to engage in polemics without any concern for practical implementation of the project' (Marquis, 2009: 14). Consequently, it has been suggested that citizens should not be requested to vote on a popular initiative which cannot produce tangible effect because it violates general international law (Burri *et al.,* 2011).

For the Federal Council, 'such contradictions must be avoided in order not to place Switzerland in a position to either break its international legal commitments or to be unable to apply constitutional law in force' (Swiss Confederation, 2011: 3620). Werro and Viret (2007: 235) argue that the precedence of international law in the absence of judicial review produces a distortion in the protection of individual fundamental rights. Rights relating to the provisions of the ECHR are better protected as compared to those which are only enshrined in the Swiss Constitution. Federal Supreme Court judges have no choice but to apply the federal statute, even if it violates individual constitutional rights. But if the same individual rights are also mentioned in an international convention such as the ECHR, the judges would apply not the federal law but the provisions of the ECHR, in line with current federal jurisprudence (Vatter, 2014: 500). One way of avoiding the creation of two

categories of constitutional rights would be the implementation of judicial review in Switzerland.

## 5. The absence of judicial review in the Swiss case

De Andrade (2001: 978) holds that there are three ways of determining the constitutionality of enacted legislation. First, there is *political review* in which a political body holds absolute legislative supremacy and the courts are excluded from the process, such as in the case of the Netherlands and the United Kingdom. Second, there is *judicial review* which takes place when 'a court is empowered to set aside statutes conflicting with the constitution', such as in the case of Germany and the United States (*ibid.*; see also Lijphart, 1999: ch. 12). Third, there exists a mixed system of review in the Swiss case in which legislature and judiciary are each entitled to review different bodies of legislation. In particular, Swiss federal laws can be reviewed only through the political process, while cantonal laws and cantonal constitutions – located below the federal level – can be reviewed by the Federal Supreme Court (*ibid.*, further references omitted).

De Andrade further suggests that western countries have 'developed two main forms of judicial review: the American common law system and the continental European civil law system' (2001: 979). The American system of review, also called decentralized or diffuse model, is located in the judicial system as a whole and there exists no specific court or tribunal with monopolistic jurisdiction. On the other hand, the European or centralized model 'is characterized by the existence of a special court, with exclusive or close exclusive jurisdiction over constitutional rulings' (Stone Sweet, 2003: 2769–2770). Another difference is that the American system allows the constitutionality of a statute to be examined when a legal dispute exists, while the European system of judicial review allows determining the compatibility

of a statute with the constitution in the abstract even in the absence of a concrete case (de Andrade, 2001: 983).

In addition, a distinction between weak and strong forms of judicial review can be drawn. It has been pointed out that U.S. judicial review represents a strong system, where interpretive judgments from the higher courts are 'final and unrevisable by ordinary legislative majorities' (Tushnet, 2008: 33) and '[t]he people have little recourse when the courts interpret the Constitution…' (*ibid*.: 22). On the other hand, weak forms of judicial review allow the political authorities to revise the judges' interpretation of constitutional articles without the need to use special majority legislative processes (Lijphart, 1999: 220).

Zhai (2009) explains the absence of judicial review in Switzerland at the federal level with the Swiss direct democracy, and there exists a notion that it is the people themselves who exercise constitutional review. A second reason for Zhai (*ibid.*) is strong cantonal identity and decentralized loyalty.

Lastly, the existence of a flexible federal constitution might be another factor, '[u]nlike the United States, then, Switzerland is not governed by its constitution; its constitution reflects how it is governed' (Steinberg, 1988: 16–17). Thus, in the Swiss example of consociational democracy, the people have the last word in the absence of a judicial review at the federal level. Any amendment to the Constitution requires the double majority of the people and the cantons as stated in Article 142 of the Swiss Federal Constitution.

# III. Searching for solutions

## 1. Recent failed attempts to introduce judicial review in Switzerland

In 1996, the Federal Assembly made an effort to include the concrete review of federal laws by the Swiss Federal Supreme Court within the reform of the Swiss judicial system (Rothmayr, 2001). However, no agreement between the two chambers of the Federal Assembly could be found, and judicial review was subsequently removed from the package of judicial reform. Vatter (2008: 17) concludes that the Federal Assembly withdrew the proposal due to the fact that 'a constitutional court system [was] seen as a restriction of direct democratic popular sovereignty'.

The issue of judicial review was raised once more when two parliamentary initiatives were submitted by Müller-Hemmi/SP (2007)[12] and Studer/EVP (2005)[13] in the National Council (lower chamber) of the federal parliament. These initiatives resulted in a second legislative effort to adopt a federal judicial review (Swiss Confederation, 2010: 2265). The Committees for Legal Affairs of the National Council and Council of States respectively debated the two parliamentary initiatives and subsequently requested the Swiss government for a formal draft on constitutional amendment.[14] After some delay, this governmental draft on judicial review was agreed by the National Council and forwarded to the Council of States (upper chamber).

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12) Social Democratic Party of Switzerland, accessible at: http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20070476.

13) Evangelical People's Party, accessible at: http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20050445.

14) In Switzerland, both chambers of parliament enjoy equal powers and have an identical committee structure. Failure of both chambers to agree on a legislative proposal means that the proposal has failed.

This time around, a majority favoured a diffuse and weak model of judicial review. In this model, no specific court is entitled to review the constitutionality of federal laws. Instead, any judge could check the compatibility of laws with the Federal Constitution before applying them. Crucially, this model of judicial review would have let the constitutional Article 139 untouched, which relates to the validity of popular initiatives. Moreover, courts would not be able to make a statute disappear from the legal order. This right would still be exclusively retained by the parliament in case of federal laws and by the people and the cantons in the case of constitutional provisions.

The supporters of judicial review in the upper chamber put forward arguments pointing to the enhancement of the rule of law. For example, Savary/SP highlighted the anomaly that the judges of the European Court of Human Rights in Strasbourg exercise currently more power than Swiss judges on verifying Swiss laws (ATS, 2012). Since there is currently no judicial review in Switzerland, potential victims of violations of Human Rights, mentioned in the European Convention of Human Rights, can file a complaint to the European Court of Human Rights in Strasbourg. Rulings of the European judges have a binding effect and the judges of the Federal Supreme Court must therefore follow the decision of the European Court of Human Rights, which can be said to perform ‘a role of quasi-constitutional court of Switzerland’ (Zhai, 2009: 20).

Opponents of the reform in the upper chamber argued that a potential politicization of judges could weaken direct democracy. For example, Jenny/ SVP claimed that a decision made by the Swiss people through a referendum could be ignored by judges because they no longer have the obligation to strictly apply the law (Swiss Parliament, 2012: 443). Moreover, it was argued that judges might endanger social protection laws. For instance, Rechsteiner/SP was reluctant to entrust federal and cantonal courts with issues such as maintaining public services or the retirement age of women. He pointed to the gate keeper

function of the US Supreme Court in the case of Obama's health care reform as a negative example (ATS, 2012). Finally, it was argued that direct democracy institutions had become a core part of the Swiss identity that was now untouchable for a majority of the people (Marquis, 2009). In conclusion, the opponents of judicial review argued for the principle of the 'supremacy of parliament and the people' (Rothmayr, 2001: 82).

The latest attempt to introduce judicial review in Switzerland failed on June 5, 2012 when the Council of States overruled the recommendation of its own Committee for Legal Affairs, and decided with a 63 per cent majority of votes against the abrogation of Article 190 of the Constitution, which states in the (non-official) English-language translation that '[t]he Federal Supreme Court and the other judicial authorities apply the federal acts and international law' (Federal Constitution of the Swiss Confederation, 1999). This article implies that judges must always apply the law, even if they believe it to be in conflict with the constitution and international law.

Crucially, abrogating Article 190 would have allowed any cantonal and federal judge to verify the conformity of a federal law with the Constitution. Therefore, this would have introduced the right to conduct judicial reviews of a federal law (Masmejan, 2012; Rouiller, 2012). The parliamentary initiatives were returned to the National Council, which in a second round of debates took on board the position of the upper chamber reversing its earlier position. Thus, in December 2012 the proposal was ultimately withdrawn, which ended the prospects for the introduction of judicial review of federal legislation in Switzerland for the time being.

## 2. The absence of judicial review and consensus democracy

For Arend Lijphart, one of the leading commentators on Swiss consociational

democracy, a major analytical distinction exists between a consensus model of policy-making and the pure majoritarian system (1999: ch. 3). The former is generally based on a rigid constitution that is protected by judicial review and the need to mobilize supermajorities in parliament to conduct constitutional amendments. The latter case is generally characterised by a flexible constitution and the absence of judicial review or the requirement to gain supermajorities in parliament (*ibid.*: 216). It is therefore important to stress that Switzerland, as a paradigm case of the consensus model of democracy, differs from other cases on two accounts.

First, parliament has the right to amend the Swiss Constitution acting with a simple majority rather than a qualified majority. Yet this right of decision-making of parliament on changes of the Constitution is subject to the 'mandatory referendum' and requires a double majority of the people and the 26 cantons in order to approve it (see Table 1). It can therefore be argued that Lijphart's condition of a 'qualified' majority does apply in the sense that it is shifted from the parliamentary level to the Swiss electorate.

Second, Lijphart stresses that the absence of judicial review, defined as 'the power to test the constitutionality of laws passed by the national legislature' (1999: 223), is in the Swiss case 'the only majoritarian feature in an otherwise solidly consensual democracy' (*ibid.*: 230). Yet this absence of judicial review at the federal level is only one of the dimensions of the Swiss legal system while other features follow the model of consensus democracy. For example, the composition of the Swiss Federal Supreme Court reflects the political composition of parliament, with all the judges being selected according to their political party affiliation – and also according to geographical, linguistic, and professional criteria (Vatter, 2014: 488-95; Federal Supreme Court, 2012).

Until the early 1990s, the Federal Supreme Court could have been considered without any power other than the application of the federal law, due to Article

190 of the Federal Constitution, which excludes the review of federal laws. However, since 1991 'the Federal Supreme Court has been willing to examine the conformity of federal laws with the ECHR and the judgements of the ECtHR. With regard to some fundamental rights, constitutional review has thus *de facto* been extended to federal laws without a fundamental amendment of the constitution' (Kälin, 2004: 184).

As a result, the Federal Supreme Court changed its jurisprudence due to the human rights guaranteed by the ECHR, which largely overlap with the ones already contained in the Federal Constitution (*ibid.*). The Federal Supreme Court has been 'creative and not strictly following an interpretative model' (Rothmayr, 2001: 85), and judicial court activism on fundamental rights subsequently influenced the expanded list of basic rights in the fully overhauled Swiss Federal Constitution of 1999.

If diffuse judicial review would have been adopted by abrogation of Article 190 of the Federal Constitution, judges would have gained authority to review the constitutionality of any internal law. However, the Swiss electorate would still have enjoyed the power to amend the Constitution at any point in time, without preliminary scrutiny from a legal body. Therefore, Switzerland would have remained a country with weak barriers against amending the Constitution and without clear rules avoiding potential conflict between popular democracy and international law.

## 4. Recent debates on the conflict between popular initiatives and international law

A large number of Swiss policy-making actors such as individual parliamentarians, political parties, the Political Institutions Committees of the lower and upper chamber of parliament, and civil society activists have advanced contradicting ideas on how to deal with potential and actual conflicts

between popular initiatives and international law (Burri *et al.,* 2011, footnote 7–9; Solothurner Landhausversammlung, 2010; Fontana and Hofmann, 2015). The Federal Council of Switzerland suggested adding a second section to Article 190 of the Constitution, which would allow Swiss courts to not apply federal laws or provisions of the federal constitution, if these are in conflict with mandatory international law or international law previously endorsed by a popular referendum. In addition, federal laws would also not be applied when international courts ruled that they offended against international law (Swiss Confederation, 2010: 2325).

The Federal Council also considered four options to extend the motives of invalidation of popular initiatives, namely:

1. to create additional barriers against initiatives that violate international laws of vital importance for Switzerland.
2. to introduce international human rights guarantees as a new and/or additional criteria to validate popular initiatives.
3. to establish a list of significant international rules or treaties as a general barrier against constitutional amendments.
4. to introduce the criteria of legal or political inapplicability [*Undurchführbarkeit*] of popular initiatives, due to offences against international law, as a new reason for invalidation (Swiss Confederation, 2011: 3640).

However, it was concluded that establishing stricter limits on the validity of popular initiatives would generate new legal and political problems since each of the considered options was difficult to apply in practice. For example, defining which international legal provision could be said to be of vital importance to Switzerland or issues relating to the legal and political inapplicability of constitutional provisions would still remain matters of political judgment [*Ermessen*]. Last but not least, the current Swiss Constitution

demands that political decisions on constitutional changes are due to the people and the cantons rather than the Federal Assembly in the context of deciding about the validation of popular initiatives (*ibid.*).

More recently, the Political Institutions Committees of the two chambers requested the federal government to report on potential solutions to the problem of conflicts between direct democracy and international law. On February 19, 2014, the government advanced two proposals: first, to provide non-binding judicial recommendations to the initiators of popular initiatives concerning the compatibility of their proposals with international law and fundamental rights; second, to put forward new criteria to invalidate popular initiatives in case of the violation of the core of constitutional fundamental rights, However, the government realized after consultations that consensus was lacking and support was weak and therefore recommended dismissal of its own proposals to parliament (Swiss Confederation, 2014).

On June 22, 2014, new controversy arose when the media disclosed the existence of a 'secret' reflection group named 'Democrazia Vivainta', which had been set up by the Federal Chancellery - the administrative body serving the Federal Council - to work on the reform of popular initiatives from a political rights perspective (Huber, 2014).[15] While the reflection group, drawn from a narrow sample of the government bureaucracy, academia and business, had previously received a formal mandate from the Federal Council in connection with the publication of the February 19, 2014 report, this had been unknown to the general public. In fact, the existence of the reflection group proved to be a surprise even for some political insiders in bodies such as the Political Institutions Committees. The SVP president Toni Brunner, for example, reacted with harsh criticism claiming that 'Federal Bern has become extremely

15) The chief of staff of the Federal Chancellery is elected in parallel with the members of the Federal Council by the Federal Assembly. The Chancellery assists both Federal Council and Federal Assembly but reports only to the Federal Council.

non-transparent' (Kohler, 2014).

Meanwhile, popular initiatives being submitted to the Swiss popular vote have raised new questions beyond the scope of the conflict between direct democracy and international law. Two such initiatives, both introduced by the right-wing populist SVP, have recently been accepted by the Swiss population, namely the initiative 'For the deportation of criminal foreigners' on November 28, 2010 and 'Against mass immigration' on February 9, 2014. The former case questions fundamental principles of the legal system, such as the proportionality principle in the punishment of crimes - since even minor offences of foreigners are supposed to result in automatic deportation - as well as the discretionary power of judges. In the latter case, already implemented bilateral agreements between Switzerland and the European Union about the free mobility of workers are questioned (Gemperli, 2015).

Unlike the ban on the construction of minarets, these two initiatives have profound impact on the executive and legislative powers since the Federal Council is now forced to formulate legislation, which either contradicts international law or questions bilateral treaties. Thus, the Federal Assembly, being the authority that would have the power to invalidate popular initiatives, is increasingly confronted with problematic popular initiatives with regard to international law and judicial principles.

Between 1996 and the spring of 2014, the Federal Assembly consistently followed recommendations of the Federal Council and did not invalidate any popular initiative that had collected the necessary signatures. Therefore, all were forwarded to the stage of the popular vote. Yet the Federal Assembly recently showed less unanimity when it came to the post-initiative stage of transforming constitutional popular initiatives into federal laws. An important development in this context is the ongoing conflict about the implementation of the SVP initiative 'For the deportation of criminal foreigners' that was approved by a majority of 52.3 percent of the Swiss electorate on November

28, 2010. The initiative demanded that foreigners committing certain categories of crimes in Switzerland should be automatically deported. From the point of view of proportional justice, with regard to the discretionary power of judges, and due to conflict with international law, the initiative was rejected by the other main political parties.

After two years of post-initiative debate about scenarios for implementation, the SVP blamed the government for endless delaying tactics and launched a second popular initiative, called 'implementation initiative', which was submitted with the necessary number of signatures in December 2012. Significantly, this second initiative was intended to put pressure on parliament to speed up deliberations and to implement the original initiative. In fact, this was without precedent in Swiss political history and amounted to a new tactic of using the popular initiative to force the hand of parliament while the legislative process was still ongoing.

Meanwhile, in summer 2013, the Federal Council submitted a middle-way proposal, which avoided the automatic deportations of foreign criminal offenders and took into account the principle of proportional justice. However, subsequent debate about whether to follow the original SVP proposal of automatic deportation, among other conflicting points, or the more moderate Federal Council proposal highlighted the deep divisions within the Swiss political class between the political parties, the two branches of parliament and within the committees of each branch.[16] Ultimately, the mainstream centre-right parties gave up their previous resistance in the National Council under threat of the second SVP initiative and the lower chamber decided to implement the 2010 SVP initiative 'For the deportation of criminal foreigners' in March 2014.[17]

16) There was disagreement in the National Council between the Committee for Legal Affairs, which supported the government's 'middle road' proposal, while the Political Institutions Committee accepted the SVP position.

17) According to Verena Diener, the head of the Political Institutions Committee of the Council of States, the scenario accepted by the National Council would result in the annual deportation

On the other hand, the Political Institutions Committee of the Council of States – the chamber in which SVP representation is lower – continued to oppose the decision of the National Council. Instead, the upper chamber elaborated on an alternative bill, which took into account the principle of 'non-refoulement', i.e. the outlawing of the deportation of foreigners to countries where they might face torture. Moreover, issues such as the rule of law in state actions, the proportionality of law and fundamental rights, such as mentioned in Articles 29 and 30 of the Swiss Constitution and the Articles 8, 11 and 13 of the ECHR were also considered. The alternative bill of the upper chamber was approved during the 2014 winter parliamentary session and has since also been agreed by the lower chamber during the 2015 spring parliamentary session. However, the initial disagreement between the two chambers of parliament underlined the disruptive potential of popular initiatives to put the existing framework of Swiss policy-making into deadlock.

## IV. Conclusion

In the context of Swiss direct democracy, the popular initiative has served to allow groups outside of the mainstream of the Swiss political system to make their voices heard and to directly or indirectly influence policies. In the past, direct democracy allowed for the step-by-step extension of the Swiss system of consociational democracy by putting pressure on the elites to

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of 9,000 foreign offenders while the original 2010 SVP initiative would trigger a somewhat lower number of deportations. Diener also stressed that the second 'implementation initiative' of the SVP – if forwarded to a popular vote and accepted in a referendum – would result in an even higher figure of around 18,000 annual deportations of foreign offenders from Switzerland (Burkhardt, 2014).

consider new demands and issues and to avoid blockages (Church and Vatter, 2009: 414). This triggered the opening of government to new forces and helped to negotiate and partially overcome divisions in Swiss society, such as the religious, linguistic, regional, socio-economic and left-right cleavages. Thus, the existence of channels for a direct popular voice - in the popular initiative - helped to unite the major political actors into the consensual system of government that is still in place today.

However, this logic of direct democracy as one of the driving forces of political participation and integration has now stopped working due to changes elsewhere in the Swiss political system. The two most significant developments since the 1990s are changes in the party system and increased Europeanization and internationalization of domestic policy-making (Sciarini, 2014). As for the former, a shift from moderate pluralism toward polarized pluralism in the Swiss party system can be observed. This shift is at least partially due to the earlier weakening of corporatist structures in the Swiss polity since the 1970s in line with other continental European countries. At the level of the party system, this has been mostly - but not exclusively - caused by the political transformation of the SVP which has increasingly adopted populist right-wing positions.

In 2007, the SVP even considered leaving the Federal Council and to enter opposition - a step that would have ended the existing practice of power-sharing that has been in place in its current form since 1959. In turn, leftist and centrist forces have more recently positioned themselves against the SVP questioning the democratic credentials of the party and arguing in favour of mechanisms to limit the influence of the SVP on policy-making (Zeller, 2014).

In parallel, Swiss policy-making has become less insulated and is increasingly subject to pressures deriving from Europeanization and internationalization. Mandatory international law and less imperative international treaties, such as the Schengen agreement as part of the bilateral treaties with the EU, have

reduced the domain of domestic policy-making. This has resulted in a deepening of cleavages between those who accept the political logic deriving from international agreements and international law, and others who insist on constitutional freedom in the decision-making processes of direct democracy. One might ask, therefore, whether absence of limits to popular initiatives in the current Swiss Constitution might produce threats for other institutions of Swiss democracy.

The quasi absence of limits to popular initiatives has certainly encouraged initiators' audacity and boldness of their sponsors. For example, the 2010 initiative 'For the deportation of criminal foreigners' arguably questions the rule of law, principles of justice and fundamental human rights. This particular SVP initiative was in turn backed up by a second 'implementation initiative', also submitted by the SVP in 2012, and is currently pending. It challenges basic democratic principle such as the separation of powers by putting pressure on parliament to force its hand on deliberations.

Reacting to these developments, the Council of States tackled the issue of conflicts between popular initiatives, international law and other conflicting democratic and legal principles in its 2014 summer parliamentary session by requesting an overall analysis of the problem. Rather than validating each initiative for itself, as had been the case since the last invalidation in 1996, the Political Institutions Committee chairwoman, Verena Diener, voiced concern about the current state of Swiss popular initiatives: 'Each initiative that we simply rubber-stamp creates precedents. Upcoming initiatives will be "bolder" still. Every time, earlier initiatives are suddenly instrumentalized to formulate legal texts (…) or to provide for retroactive effects over a number of years - creativity does not encounter limits anymore' (Swiss Parliament, 2014: 414).

This recent more critical attitude of the Council of States concerns conflicts between popular initiatives and international law - the focus of the current

article – and other problems such as clashes with internal Swiss standards contained in the constitution, with basic principles of law, and regarding the separation of powers. These conflicts emerge from the inbuilt tension between the liberal democratic or Madisonian state with its focus on the rule of law and fundamental rights, on the one hand, and the republican democratic or Rousseauian state with its focus on the direct and unmediated decision-making power of the people. Liberal and republican principles of democracy can feed each other – but they can equally oppose each other.

These problematic features of Swiss direct democracy have been in place for a long time, and resulting tensions were ingrained in the Swiss constitutional system since the popular initiative was introduced in 1891. However, conflicts became more acutely visible during the first decade of the 21th century and caught the attention of international audiences with the 2009 initiative that introduced the ban on the construction of minarets into the Swiss Constitution. This popular initiative demonstrated how the application of Swiss direct democracy and the parallel expansion of international law protecting fundamental rights can result in conflicting situations and illustrates the potential opposition between liberal and republican statehood.

Switzerland has always been cautious regarding innovations coming from outside, considering itself for a long time a *Sonderfall* and only prudently joining international organizations or treaties. Developments since the 1992 rejection in a referendum of European Economic Area membership underlined that neither a shift toward full-scale EU integration nor a return towards isolation was feasible. Indeed, bilateral agreements between Switzerland and the EU were the compromise reached in reaction to the 1992 decision. The search for a viable solution to the conflict between domestic direct democracy and the larger international legal and normative environment, as suggested by the Council of States, could give rise to further polarization of the Swiss polity.

Establishing a Constitutional Court along the lines of the centralized European

model and granting it the power to review popular initiatives before their submission to a popular vote could have provided a definitive solution to problematic cases of popular initiatives that are in conflict with *de facto* mandatory international law. Although the judicial review of popular referendums along the lines of a diffuse and decentralized model was considered in the Swiss political debate between 2011 and 2012, the two chambers of parliament have ultimately refused it. Thus, the political powers, legislative and executive, continue to claim parliamentary supremacy over the judiciary.

Although conflicts between direct democracy and international law are of the greatest concern, many other issues relating to domestic fundamental rights or basic constitutional principles also require solutions. Moreover, the possibility of unlimited *post-hoc* initiatives can always threaten the long-term plans and policies of the federal government. Thus, Swiss policy-makers may have to explore direct political steps to reform the popular initiative with the view to defend their ability to deliberate and to act (Cassidy, 2014).

In summary, consensus democracy in Switzerland has declined to a significant extent. The political system is now more polarized and the long-standing collegial federal government, that includes the SVP, is sometimes questioned. Opposition between liberal and republican features of democracy has become much more visible due to the decision on the part of political parties in the Federal Council – particularly on the part of the SVP – to use the popular initiative in a much more unrestrained manner to push forward their political agendas, even if such agendas are in conflict with national or international established norms.

This leaves one to conclude that the decline of consociational democracy in Western Europe, similar to earlier developments in the Belgian and Dutch cases, has also arrived in Switzerland. It is certainly too early to conclude that Swiss consociationalism is beyond repair (Vatter and Stadelmann-Steffen, 2013). Yet observers of Swiss affairs might have to focus less on the

continuing existence of institutions of consensus democracy and shift their attention more to the actual use of these elements. Thus, the way in which political actors in Switzerland address the conflict between direct democracy and the larger system of international legal and normative obligations might indicate whether or not Swiss consociationalism has a lasting future.

## <References>

Andrade, G. de. "Comparative Constitutional Law: Judicial Review." *Journal of Constitutional Law*, Vol. 3, No. 3, 2001, pp.977 - 989.

Agence Télégraphique Suisse (ATS ). "Les juges ne doivent pas pouvoir défaire les lois." *Le Temps*, 5.06.2012. http://emploi.letemps.ch/Page/Uuid/982bdba4-aef7-11e1-8217-282d8dd650e3%7C1(accessed15.06. 2014).

Burkhardt, P. "Gegen SVP-Durchsetzungs-Initiative regt sich Widerstand." *Schweizer Radio und Fernsehen* , 24.06.2014. http://www.srf.ch/news/schweiz/gegen-svp-durchsetzungs-initiative-regt-sich-widerstand (accessed 30.06.2015).

Burri, N., K. Grossenbacher, A. Schinzel and D. Suter. "Volksinitiativen: Bausatz Für Eine Reform." 2011. http://www.foraus.ch/media/medialibrary/2011/05/Volksinitiativen_Bausatz_fuer_eine_Reform.pdf (accessed 30.06.2015).

Cassidy, A. "Brisanter Plan: Höhere Hürden für Initiativen." *Schweiz am Sonntag,* 4.10.2014. http://www.schweizamsonntag.ch/ressort/politik/brisanter_plan_hoehere_huerden_fuer_initiativen (accessed 30.06.2015).

Church, C. and A. Vatter. "Opposition in Consensual Switzerland: A Short but Significant Experiment." *Government and Opposition*, Vol. 44, No. 4, 2009, pp.412 - 427.

Distefano, G. and P. Mahon. "Ban on Minarets from the Standpoint of Swiss Constitutional Law and Public International Law (Jus Cogens)." *Journal Sharia and Law,* No. 45, January, 2011, pp.69 - 84.

European Court of Human Rights (ECtHR). "Press Release No. 101/2011, 8 July 2011." *Prohibition on building minarets in Switzerland: applications inadmissible*. 2011. http://www.ejpd.admin.ch/content/dam/data/gesellschaft/gesetzgebung/minarettverbot/110708_minarettverbot-e.pdf (accessed 30.06.2014).

Federal Assembly. "Bundesgesetz über die Bundesversammlung (Parlamentsgesetz)." (Status of 25 November 2013). 2013. http://www.admin.ch/ch/d/sr/1/171.10.de.pdf (accessed 30.06.2015).

Federal Chancellery. "Vorlage Nr. 547, Volksinitiative vom 08.07.2008 'Gegen den Bau von Minaretten'." 2009. http://www.admin.ch/ch/d/pore/va/20091129/det547.html (accessed 30.06.2015).

---- "Voraussetzungen für die Gültigkeit von Volksinitiativen und die materiellen Schranken der Verfassungsrevision." 2012, pp. 55-71. http://www.bk.admin.ch/dokumentation/02574/07094/index.html (accessed 30.06.2015).

Federal Constitution of the Swiss Confederation [1999]. Official English-language translation, status as of 9 February 2014. http://www.admin.ch/ch/e/rs/101/index.html (accessed 30.06.2015).

Federal Supreme Court. "Richter und Personal." 2012. http://www.bger.ch/index/federal/federal-inherit-template/federal-richter.htm (accessed 30.06.2015).

Fontana, K. and M. Hofmann. "Volksrechte und Völkerrecht. Wer das letzte Wort im Staat hat. "*Neue Zürcher Zeitung*, 26.06.2015. http://www.nzz.ch/schweiz/wer-das-letzte-wort-im-staat-hat-1.18569081 (accessed 30.06.2015).

Gemperli, S. "Masseneinwanderungsinitiative: Bundesrat und SVP vollziehen Kehrwende." *Neue Zürcher Zeitung*, 18.02.2015. http://www.nzz.ch/schweiz/wer-kuendigt-wann-und-warum-nicht-1.18485503 (accessed 30.06.2015).

Hottelier, M. "Suisse : réforme des droits populaires de rang fédéral." *Revue française de droit constitutionnel*, No. 55, July, 2003, pp.657 - 670.

Huber, T. "Das sind die Mitglieder der geheimen Denkgruppe des Bundes." *Tages-Anzeiger*, 24.06.2011. http://www.tagesanzeiger.ch/schweiz/standard/Das-sind-die-Mitglieder-der-geheimen-Denkgruppe-des-Bundes/story/27591682 (accessed 30.06.2015).

Kälin, W. "The Judicial System", in Klöti, U., P. Knoepfel, H. Kriesi, W. Linder and Y. Papadopoulos (eds), *Handbook of Swiss politics*, 2004, pp.173 - 193. Translated by D. Lutterbeck and S. Lake. Zürich: Neue Zürcher Zeitung Publishing.

Kaufmann, B., R. Büchi, N. Braun and P. Carline (eds). *Guidebook to direct democracy in Switzerland and beyond*. Amsterdam: Initiative & Referendum Institute Europe, 2005.

Kohler, F. "Geheimgruppe des Bundes will offenbar Volksrechte abbauen." *Tages-Anzeiger*, 21.06.2014. http://www.tagesanzeiger.ch/schweiz/standard/Geheimgruppe-des-Bundes-will-offenbar-Volksrechte-abbauen/story/22628611 (accessed 30.06.2015).

Lijphart, A. *Patterns of Democracy, Government Forms and Performance in Thirty-Six Countries*. New Haven, CT: Yale University Press, 1999.

Linder, W. *Schweizerische Demokratie. Institutionen - Prozesse - Perspektiven*, 3rd ed., Bern and Stuttgart: Haupt, 2012.

Marquis, J. "La validité matérielle des initiatives populaires en droit fédéral." Master thesis, June 2009. University of Geneva. http://archive-ouverte. unige.ch/vital/access/manager/Repository/unige:6650 (accessed 30.06. 2015).

Masmejan, D. "Les juges pourront-ils un jour refuser d' appliquer une loi?" *Le Temps,* 2.06.2012. http://www.letemps.ch/Page/Uuid/675ea968-adba-11e1-8041-c2a65d6e2c4a/Les_juges_pourront-ils_un_jour_refuser_dappliquer_une_loi (accessed 30.06.2015).

Rouiller, C. "Le 'gouvernement des juges' ou le retour des peurs irraisonnées." *Le Temps*, 26.01.2012. http://www.letemps.ch/Page/Uuid/117e36ce-4787-11e1-b34f-39ddeb21f092/Le_gouvernement_des_juges_ou_le_retour_des_peurs_irraisonn%C3%A9es (accessed 30.06.2015).

Rothmayr, C. "Towards the judicialisation of Swiss politics?" *West European Politics*, Vol. 24, No. 2, 2001, pp.77 – 94.

Schefer, M. and A. Zimmermann. "Materielle Schranken der Verfassungsgebung." *LeGes: Gesetzgebung und Evaluation,* Vol. 22, No.3, 2011, pp.343 – 63. Bern: Swiss Federal Chancellery.

Sciarini, P. "Eppure si muove: the changing nature of the Swiss consensus democracy." *Journal of European Public Policy*, Vol. 21, No. 1, 2014, pp.116 – 132.

Solothurner Landhausversammlung. "Solothurner Erklärung vom 29. Mai 2010." 2010.http://www.landhausversammlung.ch/v01/1.-Solothurner-Landhausversammlung/programm-vom-samstag-29-mai-2010.html (accessed 6.12.2014).

Steinberg, J. "Imitation of Switzerland: Historical Reflections." *Government and Opposition*. Vol. 23, No. 1, 1998, pp.13 – 30.

Stone Sweet, A. "Why Europe Rejected American Judicial Review. And Why It May Not Matter." *Michigan Law Review,* Vol.101, No. 6, 2003, pp.2744 – 2780.

Swiss Confederation. "Botschaft über die Volksinitiativen 'für eine vernünftige Asylpolitik und 'gegen die illegale Einwanderung'." 1994. http://www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.do?id=10053158 (accessed 30.06.2015).

---- "Das Verhältnis von Völkerrecht und Landesrecht." 2010. http://www.admin.ch/ch/d/ff/2010/2263.pdf (accessed 30.06.2015).

---- "Zusatzbericht des Bundesrats zu seinem Bericht vom 5. März 2010 über das Verhältnis von Völkerrecht und Landesrecht." 2011. http://www.admin.ch/ch/d/ff/2011/3613.pdf (accessed 30.06.2015).

Swiss Parliament. "Amtliches Bulletin der Bundesversammlung, Sommersession 2012." 2012, pp.431 – 445. http://www.parlament.ch/Poly/Download_amtl_Bulletin/12_06/SR_4904_1206.pdf (accessed 30.06.2015).

---- "Amtliches Bulletin der Bundesversammlung, Sommersession 2014." 2014, pp.403 - 422. http://www.parlament.ch/Poly/Download_amtl_Bulletin/14_06/SR_4914_1406.pdf (accessed 30.06.2015).

Tushnet, M. *Weak courts, strong rights: judicial review and social welfare rights in comparative constitutional law*. Princeton, NJ: Princeton University Press, 2008.

United Nations (UN). *Vienna Convention on the Law of Treaties*. Vienna, 2005.

Vatter, A. "Swiss Consensus Democracy in Transition. A Reanalysis of Lijphart's Concept of Democracy for Switzerland from 1997 to 2007." *World Political Science Review,* Vol. 4, No. 2, 2008, pp.1 - 38.

---- *Das politische System der Schweiz*. Baden Baden: Nomos, 2014.

---- and D. Danaci. "Mehrheitstyrannei durch Volksentscheide? Zum Spannungsverhältnis zwischen direkter Demokratie und Minderheitenschutz." *Politische Vierteljahresschrift*, Vol. 51, No. 2, 2010, pp.205 - 222.

---- and I. Stadelmann-Steffen. "Subnational Patterns of Democracy in Austria, Germany and Switzerland." *West European Politics*, Vol. 36, No. 1, 2013, pp.71 - 96.

Werro, F. and M. Viret. "The Three Most Important Features of Switzerland's Legal System." Paper presented at the International Association of Law Schools Conference: Suzhou, China, 17-19 October 2007. http://www.ialsnet.org/meetings/enriching/werro.pdf (accessed 30.06.2015).

Zeller, R. "SP-Präsident ausser Rand und Band." *Neue Zürcher Zeitung,* 14.09.2014. http://www.nzz.ch/schweiz/kommentare/levrat-ausser-rand-und-band-1.18383374 (accessed 30.06.2015).

Zhai, G. "Constitutional Review in Switzerland and the People's Republic of China: A Comparative Study." *Travaux de recherche,* No. 43, 2009, pp.18-27. Fribourg: Institute of Federalism.

# 직접민주주의와 국제법 간의 갈등: 스위스의 사례 분석

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## <국문초록>

국제법과 갈등관계에 놓일 수 있는 스위스 국민운동의 증가는 스위스의 합의민주주의 시스템의 위기를 암시하고 있다. 2009년 국민운동을 통해 첨탑건립을 금지시킨 사례는 스위스와 스위스의 직접 민주주의에 대해 국제적인 이목을 집중시켰다. 국민운동, 즉 10만 명의 서명과 국민투표 실시를 통해 스위스 헌법은 바꿀 수가 있다. 행정부와 입법부는 국민운동의 요구를 법률로 실현시켜야 한다.

이러한 이유로 스위스 헌법의 결정이 국제법과 갈등상황에 놓일 수가 있는 것이다. 이러한 갈등은 헌법재판소의 법률적인 검토에 있어서의 실수나 국민운동의 내용에 대한 제한의 부재를 통해서 나타난다. 1999년의 jus cogens 고려, 즉 강제적인 국민법의 고려를 국민운동의 무효요건으로 도입했음에도 불구하고, 이 규정은 현재까지 한번도 사용되지 않았다. 본 논문은 스위스의 정치 제도 내에서 증가하고 있는 양극화가 어떻게 국민운동을 잠재적인 불안요소로 만드는지 살펴보고 국민주권과 국제법 간의 쉽지 않은 과제를 해결하기 위한 노력에 관해 분석하였다.

**주제어:** 다원통합형민주주의, 직접민주주의, 국제법, 법률적인 검토, 국민투표, 스위스

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